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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 401

GERTRUDE KOLLER BROWN,

Petitioner,

vs.

THE SCHOOL DISTRICT OF THE CITY OF BETHLEHEM, PA.,

Respondent.

BRIEF OF THE SCHOOL DISTRICT OF THE CITY OF BETHLEHEM, PENNSYLVANIA, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HERBERT J. HARTZOG,
Attorney for Respondent.

INDEX.

Subject Index.

	Page
Statement of the case	1
Argument	3
Point 1	3
Point 2	8
Conclusion	10

Cases Cited.

American Surety Co. v. *Baldwin*, 287 U. S. 156	5
Batrus' Appeal, 148 Pa. Super., 587	5
Bell Telephone Co. v. *Van Dyke*, 296 U. S. 533	8
Buchalter v. *New York; Weiss* v. *New York; Capone* v. *York*, 87 L. Ed. Adv. Op. 1088, 63 Sup. Ct. Rep. 1129	8
Columbia Water Power Co. v. *Columbia Elec. St. Rwy. Light and Power Co.*, 172 U. S. 475	6
Cumberland Coal Co. v. *Board of Revision*, 284 U. S. 23	6
Fox Film Corp. v. *Muller*, 296 U. S. 207	8
Gibbes v. *Zimmerman*, 290 U. S. 326	4
Honeyman v. *Hanan*, 300 U. S. 14	9
Horosko v. *Mt. Pleasant Twp. Schl. Dist.*, 335 Pa. 369, certiorari denied in 308 U. S. 553	9
Indiana v. *Brand*, 303 U. S. 95	7
Live Oak Water Users' Asso. v. *Railroad Commission*, 269 U. S. 354	8
Lynch v. *New York*, 293 U. S. 52	5
New York Cent. R. Co. v. *New York*, 186 U. S. 269	4
Oxley Stave Co. v. *Butler County*, 166 U. S. 648	4
Patterson v. *Stanolind Oil & G. Co.*, 305 U. S. 376	9
Pierre v. *State of Louisiana*, 306 U. S. 354	7
Skinner v. *Oklahoma*, 316 U. S. 547	7
Southwestern Bell Tel. Co. v. *Oklahoma*, 303 U. S. 206	6

Page

West Virginia State Board of Education v. *Barnette et al.*, 87 L. Ed. Adv. Ops. 1171, 63 Sup. Ct. Rep. 1178 8
Woolsey v. *Best*, 299 U. S. 1 8
Yick Wo v. *Hopkins*, 118 U. S. 356 7
Zadig v. *Baldwin*, 166 U. S. 485 5

STATUTES CITED.

Pennsylvania Statute of May 18, 1911, P. L. 309, as amended by Act of June 20, 1939, P. L. 482, 24 P. S. Sect. 1126 (j) 4
Pennsylvania Statute of June 20, 1939, P. L. 482, 24 P. S. Section 1126 (a) 9

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Statement of the Case.

The Petitioner's "Summary and Short Statement of the Matter Involved" (hereinafter called the "Statement") is acceptable, subject to the following corrections and additions of material omissions:

1. Correction:

In the Statement (Page "2" thereof) the Petition states that "there was an established custom and usage of the Bethlehem School District whereby applications for sick leaves or maternity leaves were made to the Board of School Directors and granted (R. 43)". An examination

of the Record (R. 43) discloses no such fact. Furthermore, the said Record reference is a quotation of allegations from Petitioner's Petition to the State Superintendent of Public Instruction praying for a hearing *de novo* (R. 44). Such hearing was held but the Record is barren of any proof of facts supporting that allegation.

2. Correction:

The Petitioner's Statement declares that Petitioner was "requested to resign" (Page "2"). The Record shows merely, however, that she was afforded an opportunity to resign (R. 24-25) and the Superior Court of Pennsylvania so found (R. 74).

3. Correction:

The Petitioner's Statement (Page "3" thereof) declares that counsel stipulated "that the charges preferred against the Petitioner did not question the Petitioner's educational competency, but that her incompetency arose because of her temporary physical disability resulting from pregnancy (R. 38)". The Record shows that the stipulation was that the charge of incompetency was limited to Petitioner's present physical disqualification "to perform the duties of her office (R. 38)"; to her "physical incompetency to perform the duties for which she was employed (R. 38)". There was no stipulation as to the degree or duration of the admitted physical incompetency.

4. Omission:

The Petitioner's Statement fails to state that no testimony was offered by Petitioner in support of her allegations in her Petition for a hearing before the State Superintendent of Public Instruction, particularly as to Paragraphs "21" and "22" thereof (R. 43-44), at the *de novo* hearings, first, before the State Superintendent, and second,

in the Court of Common Pleas of Northampton County, Pennsylvania. No facts supporting those allegations were found either by the State Superintendent (R. 6, *et seq.*), or by the Court of Common Pleas of Northampton County (R. 52, *et seq.*), or by the Superior Court of Pennsylvania (R. 74, *et seq.*), or by the Supreme Court of Pennsylvania (R. 81, 83).

5. Omission:

By letter, dated August 24, 1941 (Exhibit 7), Dr. R. M. Walls, head of the Dental Department of the School District, recommended to the Board that the Petitioner's position be filled "as the entire dental program is built around the full time services of two hygienists", of which the Petitioner was one (R. 22-23).

By letter, dated October 27, 1941, Dr. Frank Biro, Jr., chief medical inspector of the School District, advised the Board that "we further feel it our duty to point out that with only one dental hygienist it is impossible to carry out the medical program with the desirable efficiency" (R. 27).

The Record further shows that the Board promptly endeavored to secure a satisfactory substitute for the specialized duties of the Petitioner, but its efforts were attended with difficulties (R. 31-32 and 39-40).

ARGUMENT.

Point 1.

The Record discloses no Federal question was properly presented to or actually decided at any stage of the proceedings below.

Preliminarily, it should be borne in mind that this matter was heard in five tribunals—the School Board, the State Superintendent of Public Instruction, the Court of Common

Pleas of Northampton County, the Superior Court and the Supreme Court of Pennsylvania, all in strict conformity with Pennsylvania statutory requirements. In the Supreme Court it was twice considered—at the original argument and on the petition for re-argument. Not until the petition for reargument before the Supreme Court was an attempt made to raise a Federal question. The Supreme Court denied that petition without opinion.

We consider, first, Petitioner's "Statement as to Jurisdiction" (Page 4-6 of petition), and the manner in which the alleged Federal question was supposedly raised and considered below.

Petitioner asserts that the Federal question sought to be reviewed was first presented in her petition to the State Superintendent of Public Instruction (R. 40-43), for a hearing and refers to certain of her *allegations* in that petition to the effect that the School Board's action was discriminatory.

Not only was there no specific averment that the Board's action was in contravention of the Fourteenth Amendment of the Constitution of the United States (*Oxley Stave Co.* v. *Butler County*, 166 U. S. 648; *New York Cent. R. Co.* v. *New York*, 186 U. S. 269; *Gibbes* v. *Zimmerman*, 290 U. S. 326), but no proof of any facts supporting the said allegations was offered. Petitioner had abundant opportunity to present such proof, if she had any, at the hearing before the School Board and at the *de novo* hearings before both the State Superintendent of Public Instruction and the Court of Common Pleas. See Section 1205 of the School Code of Pennsylvania, Act of May 18, 1911, P. L. 309, as last amended by Act of June 20, 1939, P. L. 482, 24 P. S. 1126 (j).[1]

[1] Parenthetically, to overcome this deficiency in proof on Petitioner's part, she urges in her Argument (Pages 11 and 12 thereof) that Respondent's failure to deny her unproven allegations obliges this Court to

Moreover, what Petitioner's counsel may have stated in his written Brief and oral argument before the State Superintendent, or in the later hearing on appeal in the Common Pleas Court, forms no part of the Record, nor is it entitled to any consideration here: *Zadig* v. *Baldwin*, 166 U. S. 485; *Lynch* v. *New York*, 293 U. S. 52.

The same is true with respect to Petitioner's reference and quotation from her Brief and argument in the Superior and Supreme Courts of Pennsylvania (Page 5 of her petition). That reference and quotation are improper, forming no part of the Record, and cannot be used to sustain a claim of Federal jurisdiction: *Lynch* v. *New York, supra.*

Under Pennsylvania Appellate Court practice, the appellant's assignments of error constitute the pleadings on appeal and the scope of the Appellate Court's consideration of the appeal is limited to the matters assigned as error. In other words, nothing is in issue except matters specifically raised thereby. The Petitioner (appellant in the Supreme Court below) assigned four errors only (R. 64-68). In none of them is a Federal question raised either directly or by implication. Not until after the Supreme Court had filed its per curiam Opinion affirming the Superior Court did the Petitioner, by her petition to the Supreme Court for re-argument, attempt to raise a Federal question for the first time. The Supreme Court denied the re-argument petition without comment. Obviously, the attempt to engraft a Federal question on the proceeding is an afterthought, without merit, and too late: *American Surety Co.* v. *Baldwin*, 287 U. S. 156.

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accept them as facts. Under the School Code, *supra*, and the uniform practice in such cases, no answer by the Respondent to a petition for a hearing *de novo* is required. On a hearing *de novo*, the case is heard anew and until and unless the Petitioner offered proof of her allegations, there was nothing that Respondent could or was required to deny. See, e. g., *Batrus' Appeal*, 148 Pa. Super. 587, 594.

Furthermore, what the Petitioner now attempts to label a Federal question was not decided at any stage below. The Petitioner admits (Page 5 of her petition) that no specific reference to any Federal question was made in the Opinions of the State Superintendent and Common Pleas Court. The Record shows that the Opinions and Orders of the Superior and Supreme Courts are wholly devoid of any reference to or consideration of any Federal question (R. 73, 80). These facts, of themselves, resolve against the right of Federal review: *Southwestern Bell Tel. Co.* v. *Oklahoma*, 303 U. S. 206.

The petition for the writ (Page 5 thereof) refers to the dictum of the Superior Court that the Petitioner was not being discriminated against because of her marriage (R. 76). The incomplete reference to this portion of the Superior Court's Opinion is presumably intended to convey the idea that a Federal question had been properly raised and actually passed upon by the Court. Neither is true. A careful reading of the Superior Court's Opinion shows that it was using the word "discriminated" in its ordinary and common usage, and not in the limited constitutional sense. This is necessarily true because that Court was not confronted with any specific constitutional issue, nor was it essential to a proper disposition of the case.

As to the cases cited by the Petitioner to sustain the jurisdiction of your Honorable Court, none of them is in point on the facts. We consider them, *seriatim:*

In *Columbia Water Power Co.* v. *Columbia Electric Street Railway, Light & Power Co.*, 172 U. S. 475, the question whether there was an impairment of the obligation of plaintiff's contract by subsequent state action clearly appeared on the face of the Record from a reading of the complaint and answer.

In *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, a petition for re-argument was presented to the Supreme

Court of Pennsylvania averring that a constitutional right had been violated. The Record in that case showed that the Pennsylvania Supreme Court actually considered that contention and expressly overruled it, which under the precedents gave the Supreme Court of the United States jurisdiction to review. It is clearly distinguishable from our case. As heretofore stated in this Brief, the Order of the Pennsylvania Supreme Court denying the Petitioner's application for re-argument is barren of any consideration or decision respecting any Federal question.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, the Record contains proven facts establishing an administration of ordinances directed against a particular class of persons amounting, as the Court found, to a denial of the equal protection of the laws. That is not true in our case. Here, the Petitioner made scandalous and irrelevant allegations which she never attempted to prove in the several forums below, where the matter was heard *de novo* and where she had opportunity to do so. Not having done that, it must be apparent how baseless were her allegations in this respect.

In *Indiana* v. *Brand*, 303 U. S. 95, it appeared that the Court below deemed that a Federal question was properly before it and actually entertained and decided that question adversely to the Federal right asserted. Under such circumstances, it was clear that the Supreme Court of the United States had jurisdiction to review the final judgment entered below.

In *Pierre* v. *State of Louisiana*, 306 U. S. 354, the Federal question was raised at the inception of the proceedings by a timely motion to quash the indictment and jury panels and alleging adequate Federal grounds, and which the Court below actually considered.

The case of *Skinner* v. *Oklahoma*, 316 U. S. 547, is in the same category. There petitioner challenged the con-

stitutionality of the Oklahoma Habitual Criminal Sterilization Act on the ground that it violated the Fourteenth Amendment of the United States Constitution. In the Court of original jurisdiction, petitioner filed an answer squarely raising the constitutional issue which was considered and passed upon by the Court below.

In *West Virginia State Board of Education* v. *Barnette, et al.*, 87 L. Ed. Adv. Ops. 1171, 63 Sup. Ct. Rep. 1178, the flag salute case, the Federal question was directly put in issue by the pleadings and decided by the Court below.

In *Buchalter* v. *New York; Weiss* v. *New York; Capone* v. *New York*, 87 L. Ed. Adv. Op. 1088, 63 Sup. Ct. Rep. 1129, it appeared that the remittiturs of the Court of Appeals recited that the appellants in Brief and argument raised the point that they had been denied their constitutional rights under the Fourteenth Amendment to the United States Constitution *and* that this point was considered and necessarily decided. Those particular facts distinguish that case from ours.

POINT 2.

The decision of the Superior Court, affirmed by the Supreme Court of Pennsylvania, rests upon an adequate, fair and substantial non-federal ground.

It is well settled that where the State Court decision rests on an adequate, non-Federal ground, the Supreme Court of the United States has no jurisdiction of the case: *Fox Film Corp.* v. *Muller*, 296 U. S. 207; *Bell Telephone Co.* v. *Van Dyke*, 296 U. S. 533; *Live Oak Water Users' Assoc.* v. *Railroad Commission*, 269 U. S. 354; *Woolsey* v. *Best*, 299 U. S. 1.

Corollaries to the foregoing principle are that (a) before the Supreme Court of the United States will exercise its right of review it must appear that the disposition of a

Federal question is necessary to the determination of the cause; *Honeyman* v. *Hanan*, 300 U. S. 14; and (b) that the Supreme Court will decline jurisdiction where it appears that the question presented by the appellant "is not, and was not at the time of appealing, substantial in character": *Patterson* v. *Standolind Oil & G. Co.*, 305 U. S. 376; *Honeyman* v. *Hanan*, supra.

The application of these principles to the facts of our case resolves against Federal jurisdiction. The Petitioner was discharged after strict conformity with the statutory requisites of Pennsylvania. The Petitioner does not question the procedure. Of the three statutory grounds for discharge averred, the case was ultimately decided on the first ground, namely, "incompetency". The real question involved was the construction of the word "incompetency" as used in Section 2 of the Teachers' Tenure Act, as amended by Act of June 20, 1939, P. L. 482, 24 P. S. 1126 (a); that is, whether incompetency was limited to educational qualifications, or whether it included lack of physical ability to perform the duties incident to the employment (See R. 75). A reading of the Record will disclose that the substantial issue in all of the several forums below was this question. The only other matters urged and considered below were also the construction and application of companion sections of the School Laws of Pennsylvania. No Federal question was broached until the belated petition for re-argument in the Supreme Court of Pennsylvania.

That the decision in our case by the Supreme Court of Pennsylvania rests upon adequate, fair and substantial non-Federal grounds is apparent from a Pennsylvania case almost on all fours with ours. We refer to *Horosko* v. *Mt. Pleasant Twp. Schl. Dist.*, 335 Pa. 369. In that case, the definition of the same word, "incompetency", as used in the School Laws of Pennsylvania, was directly in issue. The Pennsylvania Supreme Court, in a precedent-making deci-

sion, held for a broad construction of that word, and that it was not limited to educational qualifications. A petition for certiorari was presented to your Honorable Court and denied: 308 U. S. 553.

One other matter requires brief comment and correction. In the "Reasons" relied on by the Petitioner for the allowance of the writ (Page 7 of the petition), it is stated that the Pennsylvania State Education Association, the intervenor in the Supreme Court below, "submitted a petition for joinder in the re-argument alleging the Federal question involved". The Record shows otherwise (R. 83-84). The intervenor's petition raised no Federal question whatsoever. On the contrary, the intervenor confines itself therein to questions involving solely Pennsylvania statutes and the interpretation thereof by the Courts of Pennsylvania. Nothing could be more convincing than that the intervenor concluded that only non-Federal grounds were involved in the case.

Conclusion.

The Respondent has not discussed the substantive merits. We believe it to be unnecessary. The Petitioner has shifted her ground in this Court. She now concedes that the construction of the word "incompetency" by the Pennsylvania Appellate Courts in this case, as including "lack of physical ability" is final and binding upon this Court (Page 10 of the petition); but now attempts to rely upon alleged administrative abuse without proof of any facts in support thereof. On the contrary, the Superior Court, affirmed by the Supreme Court, expressly found that "we are unable to discover any indication of an abuse thereof" by the School District (R. 77).

The Record itself discloses the absence of Federal jurisdictional requisites, and we respectfully submit that the

case is, therefore, not a proper one for review by certiorari in this Court, and that the petition for the writ should be denied.

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